MALAYSIA OFFSHORE MOBILE PRODUCTION (LABUAN) LTD v. PCPP OPERATING COMPANY SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[CIVIL SUIT NO: WA-22NCC-350-08-2018]
20 OCTOBER 2021

Abstract – *An advocate and solicitor who has been engaged by a party in a matter, and subsequently after the expiry of his retainer thereof has been engaged by second party for a matter against the said first party, should continue to keep confidential any confidential information that he has access to or obtained while representing the said first party. This said, the risk of disclosure should be taken as eliminated should such an advocate and solicitor, or his firm, provide an undertaking to have the documents in respect of the file created for his previous engagement deleted, and the physical file that was kept in the storage facility destroyed in the presence of the first party or his representative.*

LEGAL PROFESSION: *Advocates and solicitors – Disqualification and restraint of counsel and firm from acting for opponent – Brief engagement of firm by opponent – Firm rendered legal service relating to contract between parties – Contract subject matter in suit – Whether there would be unfair disadvantage in litigation if firm continues to represent opponent – Whether counsel and firm should be disqualified and restrained from acting for opponent*

CIVIL PROCEDURE: *Writ of summons – Renewed writ of summons – Setting aside – Computation of six-month period for renewal of writ of summons – When six-month period would terminate – Whether renewed writ of summons valid when it was served – Whether renewed writ of summons expired – Whether expiry an irregularity – Whether O. 1A of Rules of Court 2012 could be invoked to save service of expired writ of summons – Whether there was valid service of renewed writ of summons – Whether service of renewed writ of summons should be set aside*

In 2008, MISC Bhd entered into a contract with the first defendant for the leasing, operation and maintenance of two mobile offshore production units and other related facilities ('contract'). In 2009, by way of a novation agreement, MISC Bhd novated all of its rights and obligations under the contract to the plaintiff. At all material times, the shareholders of the first defendant had total control, direction and management of the first defendant. The first defendant was set up as a sole purpose vehicle to carry out the obligations under the contract. The fourth defendant was one of the shareholders of the first defendant. In 2016, the shareholders including the fourth defendant authorised the first defendant to terminate the contract. The

plaintiff then initiated the present proceedings against the defendants. In 2018, the plaintiff secured an order to serve cause papers on the third and fourth defendants who were located in Vietnam and Indonesia, respectively, pursuant to O. 10 and O. 62 of the Rules of Court 2012 ('ROC') ('service order'). The first defendant filed an application to stay the entire proceedings, pursuant to s. 10 of the Arbitration Act 2005, and the High Court allowed the said application ('stay order'). Resultantly, the stay order, the service of the writ of summons on the third and fourth defendants could not be effected at that time. In 2020, the stay order was reversed by the Court of Appeal in so far as it affected the second to fourth defendants. The plaintiff filed an application to renew the validity of the writ of summons and the court exercised its discretion to extend the validity of the writ of summons. The writ of summons together with the relevant cause papers were served on the fourth defendant by way of personal service by the plaintiff's solicitors in Indonesia. The fourth defendant sought orders to: (i) set aside the service of the renewed writ of summons on the fourth defendant; (ii) declare that the renewed writ of summons had not been duly served on the fourth defendant; and (iii) discharge the High Court order extending the validity of the writ of summons for the purpose of service ('encl. 57'). The plaintiff filed an application to disqualify and restrain the fourth defendant's counsel and the firm of Messrs Skrine ('firm') from acting for the fourth defendant ('encl. 102'). Enclosure 102 was premised on a previous brief engagement of the firm ('previous engagement') by MISC Bhd, the parent company of the plaintiff where the firm had apparently rendered legal service relating to the contract between the plaintiff and the first defendant, the subject being the matter of the present suit. The plaintiff alleged that it would suffer an unfair disadvantage in the litigation in the event the firm continues to represent the fourth defendant.

Held (dismissing encl. 102; allowing encl. 57 in part):

(1) There was no dispute that the firm was in possession of information which was confidential to the plaintiff and that such information was or may be relevant to the matter on which the firm was instructed by the fourth defendant. Accordingly, the firm had possession of relevant confidential information coming within the expression 'the same or a connected matter' with the present action. However, an affidavit had been affirmed by the firm stating that the previous engagement had ended in August 2017 and the file had been closed, archived and stored at an external storage facility. Further, the advocates and solicitors who acted or had been involved in the previous engagement had left the firm in July 2020 prior to the firm's engagement in respect of the present suit in January 2021. Additionally, none of the advocates and solicitors of the firm currently involved in the present suit had been in possession of any confidential information belonging to MISC Bhd and/or the

plaintiff in respect of the present suit. This was an affirmation made by a sworn affidavit and there was no reason to doubt the same. Significantly, each of the advocates and solicitors currently involved in the present suit was ready and willing to provide an undertaking not to access the file relating to the previous engagement currently stored at an external storage facility and/or not to communicate with any of the advocates and solicitors involved in the previous engagement on matters relating to the present suit. Such undertaking would eliminate any risk of disclosure of confidential information adverse to the plaintiff. In any case, the firm had also agreed to have the softcopy of any documents in respect of the file created for the previous engagement be deleted and the physical file kept in the storage facility to be destroyed in the presence of either the plaintiff and/or its representatives to allay any fears or concerns of any change to the same and to meet the issue relating to the difficulty in the enforcement of the undertaking. (paras 21, 26-29 & 35)

(2) In computing the six-month period for the renewal of writ of summons order, time should start on 14 July 2020. The six-month period would terminate at 12 midnight on 13 March 2021 and with the termination, the renewed writ of summons was no longer a valid writ of summon when it was served on the fourth defendant on 14 March 2021. The expiry of the renewed writ of summons is not an irregularity. Accordingly, O. 1A of the ROC could not be invoked to save the service of an expired writ of summons. The service by the plaintiff on the fourth defendant of the renewed writ of summons which had expired was set aside as it was a nullity and was invalid. By the time the renewed writ of summons was sent to the fourth defendant, the same was no longer valid document. On this basis, there could not have been valid service of the renewed writ of summons after 13 March 2021. (paras 76, 84, 90, 93 & 94)

(3) The fourth defendant contended that personal service by way of local solicitors in Indonesia was contrary to the laws of Indonesia. Order 10 r. 1 and O. 15 r. 5 of the ROC, when read together, provided that a notice of writ served out jurisdiction may be served by way of personal service so long as it is not contrary to the law of the country in which service is effected. While personal service did not appear to be expressly permitted by Indonesian law, it did not contravene any Indonesian law. In the present case, it was clearly successful in bringing notice to the defendant. (paras 95, 104 & 124)

(4) The fourth defendant's contentions that the High Court's order to renew the writ should be discharged was misconceived. In the plaintiff's supporting affidavit, the plaintiff had produced correspondences between the plaintiff and its agent to effect service of the cause papers

out of jurisdiction. These correspondence were between 29 August 2018 (when the order to issue and serve the writ out of jurisdiction was obtained) and 12 December 2018. On 11 December 2018, the first defendant obtained an order to stay the entire proceedings. The plaintiff was therefore unable to take any action to renew the validity of the writ until the Court of Appeal allowed the plaintiff's appeal in part on 19 June 2020. These matters were all disclosed to the court in the plaintiff's affidavit-in- support of the plaintiff's application to enlarge time. Further, the fourth defendant was not able to cite any authorities for the proposition that the time for the validity of the writ of summons continued to run during the currency of the stay order. There was no merit in the fourth defendant's contention. (paras 126-130)

(5) Although the court was not with the fourth defendant in respect of the issues relating to O. 11 r. 5 and the renewal of the writ of summons, nevertheless, the fact that the fourth defendant had prevailed on the issue on the validity of the renewed writ of summons mean that the service of the renewed writ of summons ought to be set aside. (para 131)

Case(s) referred to:

Abela And Others v. Baadarani [2013] 4 All ER 119 ***(refd)***
Able Food Sdn Bhd v. Open Country Dairy Ltd [2021] 4 CLJ 614 HC ***(refd)***
BNP Paribas (Fka Banque National De Paris) v. Polynesia Timber Services Pte Ltd & Anor [2002] 1 SLR 933 ***(refd)***
Dato' Azizan Abdul Rahman & Ors v. Pinerains Sdn Bhd [2021] 8 CLJ 839 CA ***(refd)***
Dato' Valumalai V Muthusamy v. Dato' Dr Tan Chin Woh [2010] 5 CLJ 758 CA ***(refd)***
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***
General Ceramics Manufacturers Sdn Bhd v. Non-Metallic Mineral Products Manufacturing Employees Union & Anor [1988] 1 LNS 128 SC ***(refd)***
Hong Leong Bank Bhd v. Ch'ng Ping Lan [2012] 1 LNS 193 HC ***(refd)***
Humpuss Sea Transport Pte Ltd v. PT Humpuss Intermoda Transportasi TBK [2015] 4 SLR 625 ***(refd)***
Jeow Fong Mei v. Chong Mee Yoke [1996] 2 CLJ 23 CA ***(refd)***
Marren v. Dawson Bentley & Co Ltd [1961] 2 All ER 270 ***(refd)***
Migotti v. Colvill (1879) 4 CPD 233 ***(refd)***
Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors [2009] 4 CLJ 303 CA ***(refd)***
Mohd Rafiq Kassim v. Menteri Dalam Negeri & Ors [2017] 1 LNS 2084 HC ***(refd)***
Prince Jefri Bolkiah v. KPMG (A Firm) [1999] 2 AC 222 ***(refd)***
Radcliffe v. Batholomew [1892] 1 QB 161 ***(refd)***
Rakusen v Ellis Munday & Clarke [1912] 1 Ch 831 ***(refd)***
Re a Firm of Solicitors [1995] 3 All ER 482 ***(refd)***
Setali Development Sdn Bhd & Anor v. Lim You Keng [1983] 2 CLJ 250; [1983] CLJ (Rep) 359 FC ***(refd)***
Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 CA ***(refd)***
Tan Chai Huat v. Yap Tian Leong [2018] 1 LNS 423 HC ***(refd)***

Legislation referred to:
Arbitration Act 2005, s. 10
Interpretation Acts 1948 and 1967, ss. 3, 54(1)(a)
Rules of Court 2012, O. 1A, O. 2, O. 3 r. 2(1), O. 6 r. 7, O. 10 r. 1, O. 11 r. 5(2), O. 15 r. 5, O. 62
Rules of the Court of Appeal 1994, rr. 6, 12

Civil Procedure Code [Indonesia], art. 388
Rules of Court [Sing], O. 11 r. 3

For the plaintiff - Raja Eileen Soraya Raja Aman & Amanda Sena; M/s Raja, Darryl & Loh
For the 4th defendant - Khoo Guan Huat, Sharon Chong Tze Ying & Janice Ooi Huey Peng; M/s Skrine

Reported by Lina E

JUDGMENT

Ong Chee Kwan JC:

Introduction

[1] This judgment covers two applications.

[2] The first application is made by the fourth defendant to set aside the service of the plaintiff's renewed writ of summons ("encl. 57").

[3] The second application is made by the plaintiff to disqualify Messrs Skrine from acting as the solicitors for the fourth defendant ("encl. 102").

Background Facts

[4] In 2008, MISC Bhd entered into a contract with the first defendant for the leasing, operation, and maintenance of two mobile offshore production units ("MOPU") and other related facilities ("contract"). On 15 September 2009, by way of a novation agreement, MISC Bhd novated all of its rights and obligations under the contract to the plaintiff.

[5] At all material times, the shareholders of the first defendant had total control, direction and management of the first defendant. The first defendant was set up as a sole purpose vehicle to carry out the obligations under the contract. The fourth defendant is one of the shareholders of the first defendant.

[6] On or about 29 January 2016, the shareholders, including the fourth defendant, authorised the first defendant to terminate the contract. To date, a total invoiced sum of approximately USD$100 million remains owing and payable to the plaintiff.

[7] The plaintiff initiated the present proceedings against the defendants in August 2018.

[8] On 28 August 2018, the plaintiff secured an order to serve the cause papers on the third and fourth defendants who are located in Vietnam and Indonesia respectively, pursuant to O. 10 and O. 62 of the Rules of Court 2012 ("ROC") ("service order").

[9] Pursuant to the service order, service of the cause papers on the third and fourth defendants would be considered complete if there was endorsement of the service and an affidavit of service affirmed to confirm the same.

[10] On 29 August 2018, the first defendant filed an application to stay the entire proceedings pursuant to s. 10 of the Arbitration Act 2005. On 11 December 2018, the High Court allowed the first defendant's said application ("the stay order"). As a result of the stay order, the service of the writ of summons on the third and fourth defendants could not be effected at that time.

[11] On 19 June 2020, the stay order was reversed by the Court of Appeal in so far as it affected the second to the fourth defendants.

[12] Following that, on 1 July 2020, the plaintiff filed an application to renew the validity of the writ of summons, and the court exercised its discretion to extend the validity of the writ of summons after hearing counsel for the plaintiff on 13 July 2020.

[13] On 14 January 2021, the writ of summons together with the relevant cause papers were served on the fourth defendant by way of personal service by the plaintiff's solicitors in Indonesia.

[14] To prove the service of the cause papers on the fourth defendant, an endorsement of the service and an affidavit of service was affirmed to confirm the same.

[15] The fourth defendant applied under encl. 57 to set aside the service of the renewed writ of summons on the fourth defendant, seeking an order:

(i) setting aside the service of the renewed writ of summons on the fourth defendant;

(ii) declaring that the renewed writ of summons has not been duly served on the fourth defendant; and

(iii) discharging the High Court order dated 13 July 2020 extending the validity of the writ of summons for the purpose of service.

[16] After parties have filed their respective written submissions and after learned counsel for the parties had orally submitted to the court, I reserved encl. 57 for decision. However, before I delivered my decision, the plaintiff

filed the application under encl. 102 to disqualify and restrain the fourth defendant's counsel and the firm of Messrs Skrine ("the firm") from acting for the fourth defendant.

[17] Enclosure 102 is premised on a previous brief engagement of the firm in 2016 ("previous engagement") by MISC Bhd, the parent company of the plaintiff, where the firm had apparently rendered legal advice relating to the contract dated 28 November 2018 between the plaintiff and the first defendant, the subject being the matter of the present suit. The plaintiff alleges that it would suffer an unfair disadvantage in the litigation in the event the firm continues to represent the fourth defendant.

[18] On 4 October 2021, I heard counsel's oral submissions on encl. 102 and proceeded to dismiss encl. 102 with costs. My grounds for the decision are set out below.

Grounds For Enclosure 102

[19] The House of Lords in *Prince Jefri Bolkiah v. KPMG (A Firm)* [1999] 2 AC 222 ("*Prince Jefri Bolkiah*") explained that an advocate and solicitor's obligation to defend and advance the interest of his former client ends with the termination of the retainer and that the only duty to the former client which survives is the continuing duty to preserve the confidentiality of information imparted during its subsistence. More specifically, the House of Lords held as follows:

> Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

[20] The confidential information imparted during the subsistence of the solicitor and client relationship is confidential information and it is the solicitor's duty to ensure that the former client is not put at risk that confidential information which the solicitor has obtained from that relationship may be used against him in any circumstances.

[21] In the present case, there is no dispute that the firm is in possession of information which was confidential to the plaintiff and that such information is or may be relevant to the matter on which the firm was instructed by the fourth defendant. Accordingly, the firm has possession of

relevant confidential information coming within the expression "the same or a connected matter with the present action. In this sense, the facts in *Prince Jefri Bolkiah* are similar to the present case. The only consideration then was to determine whether there was a risk of disclosure of the confidential information to the detriment of the former client.

[22] On the question of risk of disclosure, Lord Millett adopted the following approach:

> Once the former client has established that the defendant firm is in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an interest adverse to his in a matter to which the information is or may be relevant, the evidential burden shifts to the defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party. There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk. But the starting point must be that, unless special measures are taken, information moves within a firm. In *MacDonald Estate v. Martin*, 77 D.L.R. (fourth) 249, 269 Sopinka J. said that *the court should restrain the firm from acting for the second client "unless satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken to [*238] ensure that no disclosure will occur". With the substitution of the word "effective" for the words "all reasonable" I would respectfully adopt that formulation*.
>
> (emphasis added)

[23] Ultimately, it is a question of fact whether in a particular case before the court, there is satisfactory evidence that the steps taken by the law firm are effective to ensure that no disclosure of the confidential information will occur.

[24] The principles laid down in *Prince Jefri Bolkiah* have been followed by our Court of Appeal in *Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors* [2009] 4 CLJ 303; [2009] 4 MLJ 671 ("*Mirza*") and again recently in *Dato' Azizan Abdul Rahman & Ors v. Pinerains Sdn Bhd* [2021] 8 CLJ 839; [2021] MLJU 1414 ("*Dato Azizan*") where the Court of Appeal summarised the principles as follows:

(i) there must first be established a former solicitor-client or some fiduciary relationship between the former client and the advocate and solicitor;

(ii) the former client must prove that the advocate and solicitor is in possession of the confidential information which is relevant to the present proceedings; and

(iii) a strong case must be made out by the former client to disqualify the advocate and solicitor from acting for the existing client.

[25] The Court of Appeal in *Dato' Azizan* also emphasised that it has to be established by the applicant/former client "the real risk of disclosure of the confidential information which is adverse to him". A

[26] In the present case, an affidavit has been affirmed by the firm stating that the previous engagement had ended in August 2017 and the file had been closed, archived and stored at an external storage facility. B

[27] Further, the advocates and solicitors who had acted or been involved in the previous engagement had left the firm in July 2020 prior to the firm's engagement in respect of the present suit in January 2021.

[28] Additionally, none of the advocates and solicitors of the firm currently involved in the present suit has been in possession of any confidential information belonging to MISC Bhd and/or the plaintiff in respect of the present suit. This is an affirmation made by a sworn affidavit and this court has no reason to doubt the same. C

[29] Significantly, each of the advocates and solicitors who is currently involved in the present suit is ready and willing to provide an undertaking to this court not to access the file relating to the previous engagement currently stored at an external storage facility and or not to communicate with any of the advocates and solicitors who was involved in the previous engagement on matters relating to the present suit. The undertaking by the advocates and solicitors currently involved in the present suit will eliminate any risk of disclosure of confidential information adverse to the plaintiff. D E

[30] In the English High Court case of *Re a Firm of Solicitors* [1995] 3 All ER 482 ("*Re A Firm of Solicitors 1995*"), the solicitor in question was a former partner in a firm of solicitors retained by the plaintiffs. He was not engaged on or involved in the plaintiffs' matter. He later left to join another firm of solicitors ("new firm"). Some two and half years later, one of the defendants in the litigation retained the former partner's new firm to act as its solicitors in the litigation. The plaintiffs applied for injunctions to restrain the former partner from acting as solicitor for the defendants in the litigation. The issue before the court was whether an ex partner in the position of the former partner was free to act for an opposing party where (i) there was no positive evidence of his possession of confidential information acquired during the period of his partnership; (ii) such information was "available to him if he wanted it"; (iii) the litigation in general terms was or must have been the subject of various conversations he had and meetings he attended whilst he was a partner at the former firm, but there was no evidence that anything confidential was said; and (iv) he denied that it was said or that he ever was or in possession of such information. F G H I

[31] The English High Court dismissed the injunction application as the court was satisfied that there was no real possibility that confidential information was ever communicated to him for the following reasons:

(i) the former partner was not involved in the litigation filed by the former client;

(ii) the court found that there was no evidence that anything confidential was ever communicated to the former partner notwithstanding the following:

(a) there was in the firm no secrecy in respect of the clients' matters or perception of the need for secrecy between the partners and assistants so engaged and the former partner;

(b) the relevant confidential information circulated freely within the former firm as the litigation was not treated as a special case or with particular secrecy;

(c) the former partner had informal conversations (inferred to be in general terms) with the partner in charge of the litigation at the former firm as to how the litigation was proceeding;

(d) the former partner might have attended departmental meetings when aspects of the litigation might have been discussed; and

(e) the confidential files (including a wall chart) were available to the former partner to see if he wished to do so;

(iii) the former partner affirmed an affidavit firmly stating that no confidential information was ever communicated to him and that he was at no time possessed of any confidential information. In this regard, the court further noted that the former partner's honesty and integrity were not challenged; and

(iv) in the light of the former partner's evidence, even after applying the discount appropriate to the need to protect the clients in respect of information in the former partner's mind of which he was then unaware but recollection of which might subsequently be triggered, the court did not think that there was a real possibility that confidential information was communicated to him or that he was in possession of confidential information.

[32] Another useful case is that of the English Court of Appeal in *Rakusen v. Ellis Munday & Clarke* [1912] 1 Ch 831 ("*Rakusen*") where the Court of Appeal dismissed the plaintiff's (former client) injunction application to disqualify one of two partners, Clarke, from acting for the defendant in the arbitration proceedings although his other partner, Munday, had earlier given consultation to the plaintiff on the same matter.

[33] The facts of *Rakusen* are as follows:

(i) the defendant firm consisted of two partners only, Munday and Clarke. Their custom was to do business entirely separately, neither having any knowledge of each other's clients and each of them having the exclusive services of different clerks;

(ii) in June 1911 the plaintiff consulted Munday with regard to a possible claim against S & H Rakusen Ltd for wrongful dismissal. He had several interviews with Munday and gave him much confidential information in regard to the matters in dispute between himself and the company. At that time Clarke was away on holiday and knew nothing of the consultations. He had not seen any of the papers;

(iii) in October 1911 the plaintiff changed his solicitors and issued a writ against the company claiming damages for wrongful dismissal. The matter was referred to arbitration. In the course of the arbitration the firm were appointed solicitors to the company. It dealt wholly with Clarke;

(iv) the plaintiff objected and applied for an injunction to restrain the firm from acting for the company;

(v) despite Munday's undertaking not to act in any way in the arbitration proceedings or say anything about his consultations with Mr Rakusen and a further undertaking that Clarke's name alone should appear on the papers as solicitor to the company, the application was allowed by the English High Court; and

(vi) The English Court of Appeal overturned the High Court's decision and dismissed the plaintiff's application for injunction.

[34] The injunction application was dismissed by the Court of Appeal essentially because:

(i) Clarke did not have any knowledge of the consultation by Munday with the former client as he was away on holiday and did not see any of the papers;

(ii) Munday gave an undertaking not to act in any way in the arbitration proceedings or say anything about his consultations with the former client (plaintiff); and

(iii) Munday gave a further undertaking that Clarke's name alone should appear on the papers as solicitor to the existing client.

[35] In the present case, I am satisfied from the facts and upon the said undertaking by the advocates and solicitors in the firm that there is no risk at all of any disclosure of any confidential information that would be adverse to the interest of the plaintiff. In any case, the firm has also agreed to have

the softcopy of any documents in respect of the file created for the previous engagement deleted and the physical file that is kept in the storage facility to be destroyed in the presence of either the plaintiff and or its representative to allay any fears or concerns of any "chance" access to the same and to meet the issue relating to the difficulty in the enforcement of the undertaking.

[36] Accordingly, I dismissed encl. 102 filed by the plaintiff with costs.

Enclosure 57

[37] I will now proceed with the court's deliberation of the fourth defendant's application under encl. 57.

[38] The fourth defendant's application under encl. 57 to set aside the service of the writ is based on the following reasons:

(i) the writ of summons dated 13 August 2018 (renewed for a period of six months from 13 July 2020 by the High Court order dated 13 July 2020) ie, the "renewed writ of summons" and the statement of claim was only sent to the fourth defendant on 14 January 2021. By then, the renewed writ of summons had expired and is thus invalid and of no effect;

(ii) the renewed writ of summons was not served on the fourth defendant in accordance with O. 11 r. 5 of the ROC 2012, which stipulates that a notice of a writ to be served out of the jurisdiction cannot be contrary to the law of that country. Under Indonesian law, judicial documents including civil cases involving Indonesian lawsuits and summonses for civil cases involving Indonesian parties from foreign courts must be served in accordance with the provisions in the Memorandum of Understanding of the Ministry for Foreign Affairs and the Supreme Court of the Republic of Indonesia No. PRJ/HI/102/02/2018/01 and No. 01/NK/MA/2/2018 on the Handling of Judicial Assistance Requests in Civil Matters dated 20 February 2018 which provide that rogatory letters in civil matters from foreign countries must be addressed to the Supreme Court of the Republic of Indonesia and submitted through the diplomatic representative in Indonesia. As such, the letter dated 14 January 2021 from Messrs Daruherdani Attorneys enclosing the renewed writ of summons and the notice of renewal of writ of summons, does not constitute proper service pursuant to Indonesian law, and is thus ineffective; and

(iii) the plaintiff's *ex parte* application to renew the writ of summons dated 13 August 2018 ("renewal of writ of summons application") was not filed in compliance with O. 6 r. 7 of the ROC 2012 in that:

(a) it was not filed before the expiry of the writ of summons. It was filed approximately 17 months after the expiry of the writ of summons; and

(b) the affidavit-in-support of the renewal of writ of summons application failed to state any diligent efforts made by the plaintiff to serve the writ of summons on the third defendant and/or the fourth defendant within one month from the date of issuance or any time thereafter.

Background Facts

[39] On 13 August 2018, the plaintiff filed the writ of summons against, the first defendant, PCPP Operating Company Sdn Bhd, the second defendant, Petronas Carigali Sdn Bhd, the third defendant, Petrovietnam Exploration Production Corporation and the fourth defendant, PHE. The second, third and fourth defendants are shareholders of the first defendant.

[40] On 23 August 2018, the plaintiff filed an application to serve the notice of writ of summons on the third defendant and fourth defendant (incorporated in Vietnam and Indonesia, respectively) out of the jurisdiction at their respective registered addresses in Vietnam and Indonesia ("application to serve out of jurisdiction"). The application to serve out of jurisdiction was allowed by the High Court on 28 August 2018 ("order to serve out of jurisdiction").

[41] On 29 August 2018, the first defendant filed an application for a stay of the proceedings ("application for stay of proceedings") pursuant to s. 10 of the Arbitration Act 2005. The first defendant's application for stay of proceedings was allowed by the High Court on 11 December 2018 ("stay order").

[42] On 9 January 2019, the plaintiff filed an appeal against the stay order ("plaintiff's stay appeal"). While the plaintiff's stay appeal was ongoing, the writ of summons expired.

[43] On 19 June 2020, the Court of Appeal allowed the plaintiff's stay appeal in part and set aside the stay of proceedings order *vis-a-vis* the second to the fourth defendants.

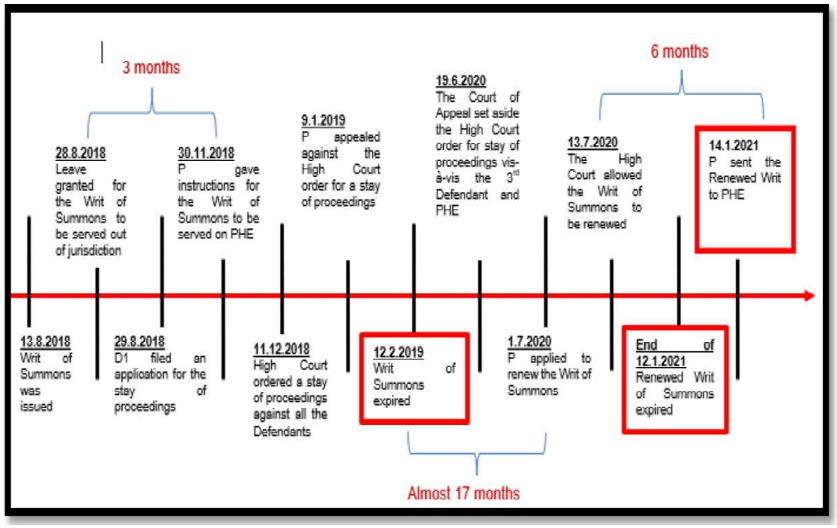
[44] Approximately two weeks after the Court of Appeal's decision and on 1 July 2020, the plaintiff filed the renewal of writ of summons application. On 13 July 2020, the High Court allowed the plaintiff's renewal of writ of summons application where the writ of summons was renewed for a period of six months beginning 13 July 2020 ("renewed writ of summons order").

[45] Despite having obtained the renewal of writ of summons order, the plaintiff did not serve the renewed writ of summons on the fourth defendant until 14 January 2021 through its solicitors in Indonesia, Messrs Daruherdani Attorneys, by a letter to the fourth defendant enclosing the renewed writ of summons, the statement of claim, the order to serve out of jurisdiction and the notice of renewal of writ of summons.

[46] On 18 February 2021, the fourth defendant filed the application under encl. 57.

[47] It is the contention by learned counsel for the fourth defendant that by the time the renewed writ of summons was sent to the fourth defendant on 14 January 2021, the same had already expired. It had expired at the end of 12 January 2021.

[48] The relevant timeline according to learned counsel for the fourth defendant is as follows:


3 months
6 months
28.8.2018
Leave granted for the Writ of Summons to be served out of jurisdiction
30.11.2018
P gave instructions for the Writ of Summons to be served on PHE
9.1.2019
P appealed against the High Court order for a stay of proceedings
19.6.2020
The Court of Appeal set aside the High Court order for stay of proceedings vis-à-vis the 3rd Defendant and PHE
13.7.2020
The High Court allowed the Writ of Summons to be renewed
14.1.2021
P sent the Renewed Writ to PHE
13.8.2018
Writ of Summons was issued
29.8.2018
D1 filed an application for the stay of proceedings
11.12.2018
High Court ordered a stay of proceedings against all the Defendants
12.2.2019
Writ of Summons expired
1.7.2020
P applied to renew the Writ of Summons
End of 12.1.2021
Renewed Writ of Summons expired
Almost 17 months

[49] On the contrary, learned counsel for the plaintiff contended that the renewed writ of summons expired only at the end of 14 January 2021.

Law On Computation Of "Month"

[50] Pursuant to the renewal of writ of summons order, the writ of summons was renewed for a period of six months from 13 July 2020. The renewal of writ of summons order reads as follows:

> (2) keesahan Writ dibaharui bagi tempoh enam bulan dari tarikh perintah ini iaitu pada 13.7.2020; dan

[51] Section 3 of the Interpretation Acts 1948 and 1967 defines "month" as "a month reckoned according to the Gregorian calendar".

[52] In the Court of Appeal case of *Jeow Fong Mei v. Chong Mee Yoke* [1996] 2 CLJ 23; [1996] 1 MLJ 387 (CA) ("*Jeow Fong Mei*"), the Court of Appeal had the occasion to deal with the meaning of the expression "calendar month". His Lordship Abdul Malek Ahmad JCA (as he then was) who delivered the decision of the Court of Appeal, observed that in computing

time by calendar months, the time had to be reckoned by looking at the calendar and not by counting the days. His Lordship also illustrated that one calendar month is to be calculated from that day of the month numerically corresponding to the day of the following month, less one.

[53] The same definition was adopted by the Court of Appeal in the more recent case of *Dato' Valumalai V Muthusamy v. Dato' Dr Tan Chin Woh* [2010] 5 CLJ 758 (CA) ("*Dato' Valumalai*") where the Court of Appeal held as follows:

> ... The word "month" is defined in the Interpretation Acts 1948 and 1967 to mean a month reckoned according to the Gregorian calendar. The phrase "calendar month" was judicially considered in *Migotti v. Colvill* [1879] 4 CPD 233 where Brett LJ states the principle clearly in that in computing time by calendar month the time must be reckoned by looking at the calendar and not by counting the days.
>
> [8] This principle is adopted in the definition of the same term in *Words and Phrases Legally Defined* (2nd edn) at p. 291 as follows: "The term a calendar month is a legal and technical term ... The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one (*Migotti v. Colvill* [1879] 4 CPD at p. 238 CA, per Brett LJ).

[54] The case of *Jeow Fong Mei* concerned the computation of the final date for payment of the balance purchase price under a sale and purchase agreement. The sale and purchase agreement stipulated that the balance purchase price was to be made three months from the date of notification by the vendor to the purchaser that the necessary approval from the relevant authority had been obtained. A further extension of two months was provided to the purchaser to make payment, after which the agreement would be of no legal effect and the purchase would be liable to forfeit 10% of the purchase price.

[55] The purchaser received the notification from the vendor on 14 July 1993. On 13 December 1993, the vendor terminated the sale and purchase agreement, alleging that the purchaser had failed to make payment of the balance purchase price within the stipulated deadline.

[56] The Court of Appeal held that the initial three months ended at midnight of 13 October 1993 whereas the additional two months commenced on 14 October 1993 until midnight of 13 December 1993. This meant that the purchaser had until 13 December 1993 to make payment and as such, the termination of the sale and purchase agreement by the vendor was premature.

[57] In the case of *Dato' Valumalai*, the Court of Appeal was concerned with, among others, the determination of the last day for the filing and service of a notice of appeal pursuant to the now repealed rr. 6 and 12 of the Rules of the Court of Appeal 1994 which provided that a notice of appeal must be filed and served within a period of one month from the date of the judgment/order appealed against was pronounced.

[58] As the High Court decision appealed against was pronounced on 13 September 2001, the Court of Appeal held that the last day for the filing and service of the notice of appeal was 12 October 2001.

[59] Learned counsel for the fourth defendant submitted that applying the same principles as set out in the cases of *Dato' Valumalai* and *Jeow Fong Mei*, the renewed writ of summons would have expired by the end of 12 January 2021 since the renewal of writ of summons order was made on 13 July 2020. The six months period commenced from 13 July 2020 and would expire on 12 January 2021 being the corresponding numerical day less one.

[60] Learned counsel for the plaintiff however contended that the six months period should only commence immediately after the renewal of writ of summons order was made on 13 July 2020, ie, 14 July 2020.

[61] In this regard, reference was made to s. 54(1)(a) of the Interpretation Acts 1948 and 1967 which states that:

> (1) In computing time for the purposes of any written law - (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

[62] Order 3 r. 2 of the ROC 2012 states that:

> Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date

[63] The provisions for computation of time under the ROC 2012 apply not only to the provisions of the rules themselves, but also to the orders given by the court. In particular, O. 3 r. 2(1) of the ROC 2012 states that:

> Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.

[64] In other words, although the order takes effect as soon as it is pronounced, for the purposes of reckoning of time the day on which the event happens is to be excluded from the computation of time.

[65] In *Setali Development Sdn Bhd & Anor v. Lim You Keng* [1983] 2 CLJ 250; [1983] CLJ (Rep) 359; [1984] 1 MLJ 26, the Federal Court held that:

> According to section 54(1)(a) of the Interpretation Act 1967 "a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the

act or thing is done." Under Rule 151 of the Rules of the Federal Court 1980 the word "month" shall be computed by calendar month according to the Gregorian calendar. The phrase "calendar month" has been judicially considered in many authorities but we need only mention *Migotti v. Colvill* (1879) 4 CPD 233 where it was held that "a calendar month is a month which ended on the same date as it commenced on the previous month".

[66] The Federal Court went on to hold that:

Thus for example if an act is to be done within one month from January 15, the last date for doing the act is February 15 – see Note 2 Order 3 at page 12 of the *English Supreme Court Practice* 1979 Vol. 1.

Since the order appealed against was made on February 28, 1982 the period of one month under Rule 56 of the Rules of the Federal Court 1980 runs from March 1, 1982. The notice of appeal filed on March 29, 1982 was therefore filed well within time.

[67] The Federal Court in *Setali* (*supra*) did not exclude the corresponding day of the next month when computing time. In *Setali*, the order appealed against was given on 28 February 1982. By the fourth defendant's logic, the last day for an appeal to be lodged would have been 27 March 1982. However, in that case, the Federal Court held that the appeal lodged on 29 March 1982 was made well within time.

[68] The Federal Court clearly excluded the day the order was made (28 February 1982) and had computed one month from 1 March 1982 to be the time accorded to the respondent in that case to lodge their appeal.

[69] Using the same computation in the instant case, learned counsel for the plaintiff submitted that the first day of the order (ie, 13 July 2020) is excluded when computing time for the validity of the writ. The six months for the writ to be served then runs from 14 July 2020 to 14 January 2021.

[70] Reference was also made to the Court of Appeal case of *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449; [1996] 1 MLJ 191 where the Court of Appeal observed that:

The High Court at Muar delivered its decision in the suit between the parties on 3 September 1994. The appellant was dissatisfied with the decision. He wished to challenge the decision of the High Court. So, on 1 October 1994, he filed an appeal in the Registry of the High Court. That was within the time limited by the Rules of the Court of Appeal 1994. But, he overlooked serving it on the respondent. The last date for doing this was 4 October 1994, and not 3 October 1994, as contended by the respondent in its affidavit. See *Setali Development Sdn Bhd v Lim You Keng* [1984] 1 MLJ 26.

[71] Learned counsel for the plaintiff submitted that the Court of Appeal's decisions in *Jeow Fong Mei* and *Dato' Valumalai* relied on by the fourth defendant were made *per incuriam*, without the benefit of the Federal Court's decision in *Setali*. In any case, it is submitted that neither of these cases dealt with the computation of time for the extension of a writ.

[72] Relying of the aforesaid, learned counsel for the plaintiff contended that given the exclusion of the day of the extension of the writ, the writ would therefore be valid for six months until on 14 January 2021 and would not have expired on 13 January 2021.

[73] To further buttress the submission, learned counsel for the plaintiff referred to the following cases where the phrase "month" was computed to mean the corresponding date on the following month, without excluding the corresponding date on the next month:

(i) the Supreme Court's decision in *General Ceramics Manufacturers Sdn Bhd v. Non-Metallic Mineral Products Manufacturing Employees Union & Anor* [1988] 1 LNS 128; [1988] 3 MLJ 474 at p. 477:

> Under s. 3 of the lnterpretation Act 1967, "month" means a month reckoned according to the Gregorian calendar. Whereas a "calendar month" is a legal and technical term; and in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days (see *Stroud's Judicial Dictionary*). Accordingly, since notice of termination was given on 15 December 1983, a three calendar month notice would, if at all, terminate the agreement on 15 March 1984, and the purported acceptance by the company of the termination of the agreement on 29 February 1984 was therefore entirely misconceived and invalid.

(ii) the High Court's decision in *Hong Leong Bank Bhd v. Ch'ng Ping Lan* [2012] 1 LNS 193; [2012] MLJU 234, which followed the Federal Court's decision in *Setali*;

(iii) The High Court's decision in *Tan Chai Huat v. Yap Tian Leong* [2018] 1 LNS 423; [2018] MLJU 383, which followed the Federal Court's decision in *Setali* and the Supreme Court's decision in *General Ceramics* (*supra*);

(iv) The High Court's decision in *Mohd Rafiq Kassim v. Menteri Dalam Negeri & Ors* [2017] 1 LNS 2084; [2017] MLJU 2068:

> [13] The Interpretation Acts 1948 and 1967 define the term month as a calendar month according to the Gregorian calendar. The dictionary meaning of a Gregorian calendar month is the period from a particular date in one month to the same date in the next month, for example from November 4th to December 4th.

[74] In *Setali*, the Federal Court had in reliance on s. 54(1)(a) of the Interpretation Acts 1948 and 1967 which stipulates that "a period of days from the happening of an event or the doing of any act or thing shall be deem to be exclusive of the day on which the event happens or the act or thing is done" held that the commencement of the period of one month for the filing of the notice of appeal shall be from the day after the order that was appealed against was made.

[75] The exclusion of the date of the order appealed against was made in the reckoning of the commencement of the period also accords with O. 3 r. 2 of the ROC 2012.

[76] Accordingly, I hold that in computing the six months period in this case for the renewal of writ of summons order, time should start only on 14 July 2020 and not 13 July 2020.

[77] As regards the computation of "month", the Federal Court in *Setali* had followed the English Court of Appeal case of *Migotti v. Colvill* (1879) 4 CPD 233 where it was held that "a calendar month is a month which ended on the same day as the day it commenced on the previous month". The Federal Court specifically referred to the judgment of Brett LJ.

[78] Upon examination of the decision, what Brett LJ said was as follows:

> I am of opinion that the term a calendar month is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one.

[79] In fact Bramwell LJ also shared the same interpretation as Brett LJ when he said:

> The only rule which can be laid down is, that where an imprisonment for a calendar month begins on a day in one month and terminates in another, so many days must be taken from the second month, if there are enough as will bring the time up to the day before that day in the second month which corresponds to the day on which the imprisonment began; that is if the imprisonment began on the 5th it would end at 12 o'clock on the night of the fourth of the following month; if on the 25th it would end on the 24th; if on the 29th it would end on the 28th ...

[80] The Federal Court in *Setali* also cited *Marren v. Dawson Bentley & Co Ltd* [1961] 2 All ER 270 where Harvers J adopted the decision in *Radcliffe v. Batholomew* [1892] 1 QB 161 where Wills J had held that in computing the period of one month after the date of complaint had arisen, the day the alleged offence was committed was to be excluded. The logic for excluding

A the day of the offence becomes clear if the period was to be reduced to one day and if the day of the offence is included, it would result in the absurdity of the person being given just a few hours to meet the dateline.

[81] Based on the aforesaid, the Supreme Court case of *General Ceramics* (*supra*) referred to by learned counsel for the plaintiff is consistent with *Setali*. In that case, the Supreme Court had observed:

> Accordingly, since notice of termination was given on 15 December 1983, a three calendar month notice would, if at all, terminate the agreement on 15 March 1984 ...

[82] The aforesaid is correct since the reckoning of the three month would commence from the day after the notice ie, 16 December 1983 and the three calendar month would fall on 12:00 midnight 15 March 1984 being the numerically corresponding date to 16 December less one day.

[83] It follows from the aforesaid that the decisions by the Court of Appeal in both *Jeow Fong Mei* and *Dato' Valumalai* were correct and not *per incuriam* as contended by learned counsel for the plaintiff in the reckoning of the calendar month based on *Migotti v. Colvill* (*supra*).

[84] Thus, in our present case, the six months period in the renewal of writ of summons order which commenced on 14 July 2020 would terminate at 12 midnight on 13 March 2021. With the termination, the renewed writ of summons was no longer a valid writ of summons when it was served on the fourth defendant on 14 March 2021.

[85] Learned counsel for the plaintiff submitted that in the event this court is of the view that the renewed writ of summons had expired on 14 March 2021, this is merely an irregularity in the service of the writ and that this would be a fit case for this court to exercise its discretion under O. 1A and O. 2 of the ROC 2012, to cure any irregularity.

[86] It is contended that the underlying purpose of O. 11 of the ROC 2012 is to ensure that notice of a claim is brought to a defendant's attention. In this case, that purpose has been achieved - the fourth defendant does not deny that notice of the claim was successfully brought to the fourth defendant's attention. The fourth defendant has not shown that it has suffered any prejudice or substantial miscarriage of justice, either by way of the mode of service or the alleged expiry of the writ.

[87] In *Able Food Sdn Bhd v. Open Country Dairy Ltd* [2021] 4 CLJ 614, the High Court highlighted that:

> [75] In so exercising discretion, I have borne in mind the underlying purpose of O. 11 ROC 2012 which is to ensure that there is evidence that service is successful in bringing notice of the claim to the defendant, and that mode is not contrary to the law of the foreign jurisdiction. In this

regard, I agree whole heartedly with the approach of Azizah Nawawi J (now JCA) in *Westport Malaysia Sdn Bhd v. Northern Democrats GmbH & Co KG* [2017] MLJU 236 where as here in this case, the defendant was served again the relevant documents and there was no prejudice or substantial miscarriage of justice to the defendant. If there was prejudice, the defendant has not shown any. The range of examples below discussed in this judgment fortifies my decision.

[88] In *BNP Paribas (Fka Banque National De Paris) v. Polynesia Timber Services Pte Ltd & Anor* [2002] 1 SLR 933 (cited with approval in *Able Food* (*supra*)), the Singapore High Court held that:

[38] Here, it cannot be disputed that the second defendant was fully aware, even before substituted service was effected, that a writ had been issued against him by the plaintiffs, because of his letter dated 17 July 2000 (see 39 below). Consequently, there is no question of his having suffered prejudice as a result of not knowing of the advertisements. In this regard, I quote the following extract from the judgment in *Karen Ahmad v. Standard Chartered Bank* (35 *supra*): [(2)] the intention which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings. If this purpose is achieved, the question as to whether the application for substituted service was in order or otherwise is no longer relevant.

[89] The court's exercise of discretion under O. 1A and O. 2 of the ROC 2012 with regards to service of a notice of writ was discussed in *Able Food* at p. 637, where the High Court found that:

[72] ... The plaintiff did all it could, and I do not find there is any fundamental irregularity in the service or certificate that goes to its roots which O. 1A and O. 2 r. 1(3) ROC 2012 cannot cure, nor has it caused the defendant a substantial miscarriage of justice when his New Zealand solicitors had in fact admitted receipt of the Notice of Writ on 5.5.2020. Hence, it cannot be disputed that the defendant was fully aware of the Notice of Writ, even before the second service referred in the following paragraph of this judgment was effected. Indeed, O. 1A exhorts the Court or Judge to have regard to the overriding interest of justice and not only to the technical non-compliance with the rules. I find this matter is eminently suitable for the application of O. 1A and O. 2 r. 1(3) as the essence of service is the notification to the defendant of the claim made against it and in this case, it has been achieved.

[90] With respect to learned counsel for the plaintiff, the expiry of the renewed writ of summons is not an irregularity.

[91] In the Federal Court case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149 ("*Datuk Captain*

Hamzah"), the Federal Court warned against allowing a party who "intentionally disregards in complying with the Rules" to invoke O. 1A of the ROC 2012. In particular, the apex court held that the plaintiff's failure to serve the renewed writ of summons during its validity is not a non-compliance that can be remedied under O. 1A of the ROC 2012.

[92] In this regard, the following passage in *Datuk Captain Hamzah* is instructive:

> [46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O. 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O. 1A of the RHC does not apply as the respondents had intentionally disregarded O. 6 r. 7(2A) for their own reasons.
>
> [47] It is now necessary to determine the meaning of the phrase "... technical non-compliance ..." in O. 1A of the RHC as it will assist in identifying the breaches contemplated by the rule. Useful guidance is provided by the meaning of the phrase "technical defect" considered in *Gangadhar Dandawate v. Premechand Kashyap* AIR 1958 MP 182 where AH Khan J said at p 184:
>
> > It is not always easy to define what the expression "technical defect" means. A technical defect in law is one which may come within the four corners of it, but it does not affect the merits of the case. It is a mistake which does not go to the core of the matter. Their Lordships of the Supreme Court in *Pratap Singh v. Shrikrishna Gupta* AIR 1956 SC 140 (C), have observed: that the tendency of the courts towards technicality is to be deprecated, that it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the legislature does not itself state which is which, judges must determine the matter, and, exercising a nice discrimination, sort out one class from the other along broad based, common sense lines. This principle was enunciated by Viscount Maugham in *Punjab Co-operative Bank Ltd, Amritsar v. Income-tax Officer*, Lahore AIR 1940 PC 230 (D).
>
> [48] In the context of the Rules of the High Court 1980 the phrase "... technical non-compliance ..." is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature.

[49] The Malaysian Court Practice 2007 Desk Edition lists at p. 9, a failure to renew a writ for service as a breach of a fundamental kind. The answer to the first question also shows that O. 6 r. 7(2A) of the RHC which deals with the service of a writ is mandatory. It follows that O. 1A of the RHC cannot be invoked to cure the failure to comply with the prerequisites O. 6 r. 7(2A) of the RHC.

(emphasis added)

[93] Accordingly and regretfully, O. 1A of the ROC 2012 cannot be invoked by this court to save the service of an expired writ of summons.

[94] In the premises, this court is constrained to set aside the service by the plaintiff on the fourth defendant on 14 March 2021 of the renewed writ of summons which had expired as it was a nullity and was invalid. By the time the renewed writ of summons was sent to the fourth defendant on 14 January 2021, the same was no longer a "valid document" and was a nullity. On this basis, there could not have been valid service of the renewed writ of summons after 13 March 2021.

Service Not In Accordance With O. 11 r. 5

[95] The fourth defendant had also contended that personal service by way of local solicitors in Indonesia is contrary to the laws of Indonesia and relied on the provisions of the Memorandum of Understanding of the Ministry of Foreign Affairs and the Supreme Court No. PRJ/H1/102/02/2018/01 and No. 01/NK/MA/2/2018 of 2018 on The Handling of Judicial Assistance Requests in Civil Matters ("MOU 2018").

[96] The MOU 2018 provides that rogatory letters in civil matters from foreign countries must be addressed to the Supreme Court of the Republic of Indonesia and submitted through the diplomatic representative in Indonesia. As such, the letter dated 14 January 2021 from Messrs Daruherdani Attorneys enclosing the renewed writ of summons and the notice of renewal of writ of summons, does not constitute proper service pursuant to Indonesian law, and is thus ineffective.

[97] More specifically, it is contended that under Indonesian law, judicial documents including civil lawsuits and summonses for civil cases must be served in accordance with the provisions in the MOU 2018.

[98] The MOU 2018 sets out the administrative guideline and procedures for, among others, assistance in the submission of judicial documents in civil matters involving Indonesian parties from foreign courts.

[99] Pursuant to art. 7 of Division 2 of the MOU 2018, requests for the submission of judicial documents in civil matters from a foreign country (Malaysia) are handled in Indonesia in the following manner:

(i) requests for the submission of judicial documents shall be submitted to the Ministry of Foreign Affairs of Indonesia through the foreign country, Malaysia's diplomatic representative in Indonesia or whose area of coverage includes Indonesia;

(ii) requests for the submission must be equipped with name of the intended party and clear addresses of litigants (plaintiffs and defendants);

(iii) requests for the submission of judicial documents along with other related documents must be accompanied by a translation of the Indonesian language unless otherwise stipulated based on a mutual legal assistance agreement in civil matters with the said foreign country, Malaysia;

(iv) the Ministry of Foreign Affairs of Indonesia shall then deliver the requests for the submission of judicial documents to the Supreme Court of Indonesia for follow up; and

(v) the Supreme Court of Indonesia shall then send the proof of receipt of the submission of judicial documents to the Ministry of Foreign Affairs of Indonesia to be delivered to the diplomatic representative of the requesting country (Malaysia).

[100] In essence, the MOU 2018 provides that service of foreign judicial documents in Indonesia are to be effected through the Ministry of Foreign Affairs of Indonesia and does not permit service by a local law firm in Indonesia. The legal opinion of Professor Dr Muhammad Hatta Ali, SH, MH, who was the Chief Justice of the Supreme Court of Indonesia from 2012 to 2020 was referred to by learned counsel for the fourth defendant in support of this proposition.

[101] In response, learned counsel for the plaintiff submitted that the service of the renewed writ of summons on the fourth defendant by way of personal service was a valid method of service and was not contrary to the laws of Indonesia.

[102] With regards to service outside jurisdiction, O. 11 r. 5 of the ROC 2012 provides the following:

> (1) Subject to the following provisions of this rule, O. 10 r. 1 and O. 62 r. 5 shall apply in relation to the service of a notice of a writ notwithstanding that the notice is to be served out of the jurisdiction.
>
> (2) Nothing in this rule or in any order or direction of the Court made pursuant to r. 5(1) shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.

(3) A notice of a writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected.

[103] Order 10 r. 1 of the ROC 2012 states that a writ must be served personally on a defendant or by way of prepaid AR registered post.

[104] Read together, O. 10 r. 1 and O. 15 r. 5 of the ROC 2012 provide that a notice of writ served out of jurisdiction may be served by way of personal service so long as it is not contrary to the law of the country in which service is effected.

[105] The plaintiff has produced the expert report prepared by Messrs Daruherdani Attorneys which provided a contrary position to that of Professor Dr Muhammad Hatta Ali, SH, MH.

[106] While the authors of the two opinions arrive at different conclusions as to whether the MOU 2018 is legally binding in nature, both agreed that:

(i) the MOU 2018 is an agreement between the Indonesian Supreme Court and the Indonesian Ministry of Foreign Affairs; and

(ii) the MOU 2018 does not expressly prohibit personal service as a mode of service outside jurisdiction.

[107] The plaintiff's position is that the MOU 2018 is a mere guideline that provides a mechanism through which a foreign party may arrange to have a writ served through an Indonesian court Bailiff. This position is supported by the expert report produced by the plaintiff.

[108] As simple examination of the words of the MOU 2018 clearly demonstrates this point. Article 2 of the MOU 2018 states that:

(1) This Memorandum of Understanding is intended to serve as a coordination guideline in handling judicial assistance requests in civil matters from Indonesian Courts to Foreign Courts and from Foreign Courts to Indonesian Courts;

(2) This Memorandum of Understanding aims to guarantee the implementation of the granting of judicial assistance in civil matters from Indonesian Courts to Foreign Courts and Foreign courts to Indonesian Courts.

[109] The word guideline has a peculiar habit of rearing its head in the documents produced by the fourth defendant. The letter on the procedure for handling the submission of court documents in civil matters from a foreign court produced by the fourth defendant also states: "Please be informed accordingly to be used as a guideline".

[110] I agree with learned counsel for the plaintiff that the MOU 2018 is merely a facilitative document. It is a guideline for a mode of service through the Ministry of Foreign Affairs when the Ministry receives a request for assistance. The MOU 2018 itself does not state that it prescribes the only permitted mode of service of foreign court papers in Indonesia.

[111] In *Humpuss Sea Transport Pte Ltd v. PT Humpuss Intermoda Transportasi TBK* [2015] 4 SLR 625, the Singapore High Court was faced with facts similar to that of the present case. In that case, the Singaporean plaintiff served its writ of summons out of jurisdiction to the Indonesian defendants at their registered address in Indonesia *via* personal service by the plaintiff's solicitors in Indonesia.

[112] The defendants applied to set aside the service for being contrary to the laws in Indonesia, making reference to the 2013 memorandum of understanding between the Indonesian Supreme Court and the Indonesian Ministry of Foreign Affairs ("MOU 2013"), the predecessor to the MOU 2018.

[113] The Singapore High Court found that the method of service was in accordance with the Singapore Rules of Court as the originating process was served personally on the defendants. In this regard, O. 11 r. 3 of the Singapore Rules of Court are in *pari materia* with O. 11 r. 5 of the ROC.

[114] Similar to the present case, the defendant in *Humpuss* (*supra*) argued that:

(i) the MOU 2013 mandated that service of foreign process in Indonesia be effected through the Indonesian Ministry of Foreign Affairs; and

(ii) under the HIR, the service of all process, both domestic and foreign must be effected through a court Bailiff.

[115] The Singapore High Court held that:

> 65. There is nothing in the MOU which states that this is the exclusive and mandatory method through which all foreign process in Indonesia must be served. Instead, the MOU merely provides a mechanism through which a foreign party may arrange to have a writ served through an Indonesian court bailiff.

[116] The court went on to hold that:

> 66. Second, I also find that, in any event, the MOU is not law. When they appeared before me, both Ms Hing and Mr Chan agreed that the MOU was not statutory law. They agreed that it was, at best, a guideline which allowed foreign parties to validly engage the services of the Indonesian court bailiff to effect service within the jurisdiction of Indonesia. This must be correct. A cursory glance at the MOU is sufficient to show that it does not (and was never intended to) be a law of general application. Just three examples will suffice: (a) Art 2(1) of the MOU states that it is

> a "joint coordination guideline"; (b) Art 10(1) states that the MOU will last for a period of five years; and (c) Art 10(3) states that the MOU is terminable (at will) by either party so long as three months' notice is provided. It is clear that the MOU only governs the relationship between the Indonesian MFA and the Indonesian Supreme Court *inter se*. It neither affects the legal rights of third parties nor does it purport to do so.

[117] A similar reasoning would apply to the MOU 2018 in our present case. As a mere guideline and agreement between the Indonesian Supreme Court and Indonesian Ministry of Foreign Affairs, the MOU 2018 cannot render the service of process invalid under O. 10 r. 1 and O. 11 r. 5 of the ROC 2012.

[118] The fourth defendant has also relied on art. 388 of the Indonesia Civil Procedure Code ("HIR"), whereby court Bailiffs are employed for service of court process. The fourth defendant and its expert assert that there is "no reason why the service of foreign processes in Indonesia can be held to a different standard from that of domestic processes which is carried out only by court Bailiffs in their capacity as organs of the court".

[119] The Singapore High Court in *Humpuss* also considered the HIR and found that:

> On the face of it, neither the HIR nor the Rv pertain to the service of foreign process. This must be right given that it is common ground between the two Indonesian law experts that there is no express statutory law which governs the service of foreign process in Indonesia.
>
> ...
>
> 72. With respect, Dr Winarta's proposition that the requirement for the service to be carried out by the Indonesian court bailiff applies mandatorily to foreign process cannot be right since Dr Winarta himself accepts that "there are no laws which govern the service of foreign originating processes on Indonesian individuals or legal entities in Indonesia" [emphasis added]. Dr Winarta attempted to bridge this "gap" by asserting that "[a]lthough [the MOU] is not law under Indonesian legislation, the Supreme Court and the MOFA will rely on [the MOU] in relation to the service of foreign originating processes on individuals or legal entities in Indonesia" [emphasis added]. However, the fact remains that the MOU is not law (see [66] above) and hence cannot mandate that the service of foreign process be carried out by the Indonesian court bailiff ...

[120] The fourth defendant asserted (supported by the fourth defendant's expert opinion), that under the Indonesian legal system, "an action that is not expressly prohibited does not render it permissible".

[121] In this regard, analysis of the words used in O. 11 r. 5 of the ROC 2012 warrants some discussion. The phrase "contrary to the law of that country", appears in O. 11 r. 5(2) as well as the O. 11 r. 3 of the Singapore Rules of Court.

[122] In *Humpuss*, the Singapore High Court observed that:

> [104] ... Generally speaking, service could be contrary to foreign law in one of two ways (see [86] above): (a) because it failed to comply with a mandatory manner of service of foreign process prescribed by foreign law; or (b) because it had been effected in a manner specifically prohibited by foreign law.

[123] The High Court in *Able Food* also noted the approach taken by the Supreme Court of the United Kingdom in *Abela And Others v. Baadarani* [2013] 4 All ER 119:

> [83] The UK Supreme Court has clearly drawn the difference between what is "not permitted under the law of the country of service" and "contrary to the law of the country of service". That is to say, whilst service may not be in a permitted form under the foreign law, it is still acceptable as good service as long as the said service does not contravene the foreign law and is successful in bringing notice of the claim to the defendant's attention.

[124] In the same vein, while personal service does not appear to be expressly permitted by Indonesian law, it does not contravene any Indonesian law. In the present case, it was clearly successful in bringing notice of the claim to the defendant.

[125] Accordingly, I am unable to agree with the fourth defendant's contention that the personal service of the writ on the fourth defendant was invalid and is contrary to Indonesian law.

Renewal Of Writ Invalid

[126] The fourth defendant contends that the court's order on 13 July 2020 to renew the writ should be discharged by the court as:

(i) the application for a renewal of the writ ("encl. 49") was filed on 1 July 2020 although the writ had expired on 13 February 2019; and

(ii) the plaintiff had failed to disclose any material facts in its supporting affidavit as to efforts to serve the writ on the fourth defendant.

[127] The fourth defendant's contentions are misconceived. In the plaintiff's supporting affidavit, the plaintiff had produced correspondence between the plaintiff and its agents to effect service of the cause papers out of jurisdiction. These correspondences were between 29 August 2018 (when the order to issue and serve the writ out of jurisdiction was obtained) and 12 December 2018.

[128] On 11 December 2018, the first defendant obtained an order to stay the entire proceedings. The plaintiff was therefore unable to take any action to renew the validity of the writ until the Court of Appeal allowed the plaintiff's appeal in part on 19 June 2020. These matters were all disclosed to the court in the plaintiff's affidavit-in-support of the plaintiff's application to enlarge time.

[129] Further, learned counsel for the fourth defendant was not able to cite any authorities for her proposition that the time for the validity of the writ of summons continued to run during the currency of the stay order.

[130] Accordingly, I also do not see any merits in the fourth defendant's contention based on this ground.

Conclusion

[131] Although this court is not with the fourth defendant in respect of the issues relating to O. 11 r. 5 and the renewal of the writ of summons, nevertheless, the fact that the fourth defendant has prevailed on the issue on the validity of the renewed writ of summons at the time the same was served on 14 March 2021 means that the service of the renewed writ of summons ought to be set aside and accordingly this court grants to the fourth defendant an order in terms of prayers 1, 2 and 4 of encl. 57.